Office-Supreme Court, U.S.
FILED
OCT 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-64

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSE MEDARDO ALVERO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the district court's instruction to the jury as to the accrual of a foreign tax for purposes of the foreign tax credit.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Barker v. *Magruder*, 95 F.2d 122 8

Battle v. *United States*, 209 U.S. 36 4

Bird v. *United States*, 187 U.S. 118 4

Cuba R.R. v. *United States*, 124 F. Supp. 182 9

Dixie Pine Co. v. *Commissioner*, 320 U.S. 516 9

Elmhirst v. *Duggan*, 14 F. Supp. 782 9

Flamingo Resort, Inc. v. *United States*, 664 F.2d 1387, cert. denied *sub nom.* *Hilton Hotels Corp.* v. *United States*, No. 82-404 (Nov. 29, 1982) 8, 10

Hart v. *United States*, 585 F.2d 1025 7

Hygienic Products Co. v. *Commissioner*, 37 B.T.A. 202, aff'd, 111 F.2d 330 9

Russell-Miller Milling Co. v. *Helvering*, 69 F.2d 392 9

Sansone v. *United States*, 380 U.S. 343 2

Page

Cases—Continued:

Texas Co. v. *Commissioner*, 9 T.C. 78 9

Travis v. *Commissioner*, 406 F.2d 987 8

United States v. *Anderson*, 269 U.S. 422 7

United States v. *Campbell*, 351 F.2d 336, cert. denied, 383 U.S. 907 ..... 6, 7

United States v. *Keltner*, 675 F.2d 602, cert. denied, No. 81-2223 (Oct. 4, 1982) 4

Willingham v. *United States*, 289 F.2d 283, cert. denied, 368 U.S. 828 4

Statutes and regulations:

Internal Revenue Code of 1954 (26 U.S.C.):

§§ 901-905 2
§ 904(a) 6
§ 905(a) 4
§ 905(b) 5
§ 905(c) 5
§ 6511(d)(3) 7
§ 6531(2) 7
§ 7201 ..... 2, 6, 7

Treas. Reg. :

§ 1.461-1(a)(2) 8
§ 1.905-2(a)(2) 5
§ 1.905-2(b)(2) 5

Miscellaneous:

Rev. Rul. 58-55, 1958-1 C.B. 266 ..... 9, 10

Rev. Rul. 61-93, 1961-1 C.B. 390 8

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-64

JOSE MEDARDO ALVERO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 698 F.2d 1148.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. A petition for rehearing was denied on April 15, 1983 (Pet. App. 15). On June 10, 1983, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including July 15, 1983. The petition was filed on July 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on four counts of willfully attempting to evade federal income taxes for 1975 through 1978, in violation of

Section 7201 of the Internal Revenue Code.[1] Petitioner was sentenced to four years' imprisonment on count one and two years' imprisonment on each of the other counts, the terms to be served consecutively (Pet. App. 4). The court of appeals affirmed, one judge dissenting (Pet. App. 1-14).

The evidence at trial showed that petitioner substantially understated his income for 1975-1978. Petitioner reported taxable income in 1975 of $14,025 (Tr. 25). Using the net worth method, the government established that petitioner's true income for that year, based on cash deposits in two Spanish banks, was at least $2,806,596 (Tr. 25, 51). Petitioner reported taxable income for 1976-1978 in the amounts of $59,890, $90,816 and $106,889 respectively (Tr. 26-27). The government established that petitioner's true income for those years, based on interest earned on the Spanish bank accounts, was at least $215,986, $322,820 and $354,527 respectively (Tr. 26-27).

Petitioner did not seriously contest the government's income figures,[2] nor did he dispute that he had willfully committed affirmative acts constituting tax evasion (Pet. App. 5). His sole defense was that the government had failed to prove a "tax deficiency" for any of the years in question, proof of which is requisite to conviction under Section 7201. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). Petitioner's defense was based on the Code's foreign tax credit provisions. I.R.C. §§ 901-905. He introduced evidence that during 1975-1978 he was a resident or citizen

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

[2]Petitioner stipulated as to the correctness of the government's figure for 1975 in order to preempt the testimony of an informant, who would have testified that the likely source of petitioner's unreported income was narcotics trafficking (Pet. App. 3).

of the Dominican Republic, which taxes its residents on their worldwide income (Pet. App. 3). He asserted that his tax liability to the Dominican Republic had "accrued" at the end of each year; that he was entitled to a U.S. foreign tax credit on account of each such accrued liability; and that the credit for each year wiped out the deficiency in U.S. tax that would otherwise have been attributable to his unreported income. Pet. App. 3-4.

Petitioner conceded that, as of the date of trial, he had never filed tax returns with the Dominican Republic, that he had never been assessed Dominican Republic taxes, and that he had never made any tax payments to that country (Tr. 651-652). Although the Dominican Republic maintains a registry of taxpayers, petitioner's name apparently does not appear in it (Tr. 815). Neither petitioner's original U.S. tax returns, nor his amended returns filed in 1981 (Exh. 11-13), claimed a credit for taxes paid or accrued to the Dominican Republic or to any other country. Petitioner produced no books or records at trial reflecting his accrual of such taxes, and his witness conceded that he had not complied with the Treasury Regulations governing assertion of foreign tax credit claims (Tr. 942, 955-957). After his trial, petitioner filed tax returns with the Dominican Republic and made partial payment to it of the taxes assertedly due (Pet. App. 4).

The district court instructed the jury as follows (Pet. App. 4) concerning petitioner's foreign tax credit defense:

> For a foreign tax credit to accrue under United States tax laws you must find that with regard to the foreign tax all events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it. That is, you must find that the foreign government is aware of the income that is taxable in their country; that the foreign government has computed

> the tax due on that income[;] and that the Defendant has acquiesced to or failed to contest that amount of tax due to the foreign government.

Petitioner objected to this instruction (Pet. App. 4). The court of appeals held that the instruction was correct (*id.* at 9).

ARGUMENT

Petitioner contends that the conditions for accrual set forth in the second sentence of the trial court's instruction are inconsistent with established principles of tax accounting. Petitioner failed, however, to lay a proper evidentiary foundation for his claim to a foreign tax credit and accordingly was entitled to no instruction on the subject; any error in the instruction actually given was thus harmless. In any event, the instruction correctly stated the law applicable to the facts of this case.

1.a. A trial court need not instruct on a defense theory for which there is no evidentiary foundation. *Battle* v. *United States*, 209 U.S. 36, 38 (1908); *Bird* v. *United States*, 187 U.S. 118, 132 (1902). In order to establish a defense based on the foreign tax credit, petitioner was required to demonstrate that he was entitled to the credits at the times he filed his 1975-1978 tax returns; eligibility arising at a later date would not eliminate criminal liability for offenses already consummated. See, *e.g.*, *United States* v. *Keltner*, 675 F.2d 602, 604 (4th Cir. 1982), cert. denied, No. 81-2223 (Oct. 4, 1982); *Willingham* v. *United States*, 289 F.2d 283, 288 (5th Cir.), cert. denied, 368 U.S. 828 (1961).

The Code sets forth strict requirements governing claims to and allowance of foreign tax credits. Section 905(a) provides that a taxpayer, regardless of his usual method of accounting, may elect to take a foreign tax credit "in the year in which the taxes of the foreign country * * * accrued, subject, however, to the conditions prescribed in subsection

(c) * * *." Section 905(c) provides, in the case of a foreign tax accrued but not paid, that the taxpayer's giving of a surety bond may be required "as a condition precedent" to allowance of the credit. Section 905(b) provides that a credit will be allowed "only if the taxpayer establishes to the satisfaction of the Secretary" the "total amount" of his foreign income, "the tax paid or accrued" on that income, and "all other information necessary for the verification and computation" of the credit.

These verification requirements are elaborated in the Treasury Regulations. They require a taxpayer claiming a credit for unpaid foreign taxes to file a copy of "the return on which each such accrued tax was based." Treas. Reg. § 1.905-2(a)(2). If the foreign tax return is unavailable, the taxpayer must submit "[a] certified statement of the amount claimed to have accrued," together with a computation of the foreign tax; "[e]xcerpts from the taxpayer's accounts showing amounts of foreign income and tax thereon accrued on its books"; a bond, "if deemed necessary by the district director"; and, in case a bond is not required, "a specific agreement wherein the taxpayer shall recognize its liability to report the correct amount of tax when ascertained * * *." Treas. Reg. § 1.905-2(b)(2).

Petitioner plainly failed to comply with these regulatory requirements for allowance of foreign tax credits at the time his offenses were committed. He had never filed a tax return with the Dominican Republic and his name did not appear in its registry of taxpayers (Tr. 651-652, 815; Pet. App. 4). He did not report any foreign income, nor claim any credit for foreign taxes, on his original or amended U.S. tax returns. He presented no records reflecting accrual of taxes to the Dominican Republic and gave no surety bond. Far from submitting an agreement "recogniz[ing his] liability to report the correct amount of tax," petitioner was actively seeking to evade the taxes of both the United States and the

Dominican Republic. Indeed, petitioner claimed the foreign tax credits in question for the first time, orally, before the district court in this case. Because petitioner failed to comply with the Code and Regulations, he was not entitled to any foreign tax credits when he filed his 1975-1978 returns and, accordingly, was not entitled to any instruction concerning a foreign tax credit defense.[3]

b. The conclusion that an individual may not assert a foreign tax credit defense to a Section 7201 tax evasion prosecution, where he has concealed the income in question both from the United States and from the other taxing nation, is supported by the only other court of appeals decision that has considered the question. In *United States* v. *Campbell*, 351 F.2d 336 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966), the defendant, like petitioner here, had made a "belated attempt to advance a credit theory" at his tax evasion trial, yet had produced "no proof of payment, accrual or offer of payment." 351 F.2d at 340. The court held that he "was not entitled to the foreign tax credit since he failed to make full and timely disclosure of his [foreign] income"; rather, "by concealment and playing one country against the other, he sought to avoid any taxation whatsoever" of his gains. 351 F.2d at 339, 340. The defendant's theory, the court noted, would permit people to evade taxes with impunity if they were fortunate enough to own a residence abroad: they could try to "cheat both countries of any tax," then retroactively assert the foreign tax credit "as

---

[3]As the court of appeals noted (Pet. App. 9 n.1), there was an additional lack of proof of a foreign tax credit defense as to petitioner's 1975 taxable year. The credit is available only if a taxpayer has income from sources outside the United States. I.R.C. § 904(a). Petitioner, however, offered no proof whatever on the source of his income for 1975. As noted above (see p. 2 n.2, *supra*), the government originally sought to prove that the likely source of petitioner's income was drug trafficking; in view of petitioner's stipulation, however, the government did not present this evidence.

an absolute defense" once they sensed the IRS on their trail. 351 F.2d at 338, 341.[4] The court concluded that "[i]t would be anomalous to allow criminal responsibility under United States law for an otherwise consummated crime to depend absolutely on the subsequent and possibly fortuitous imposition of tax liability under foreign law." 351 F.2d at 339.[5]

2. In any event, assuming that petitioner was entitled to an instruction concerning the foreign tax credit, the trial court's instruction was proper. It reasonably interpreted established principles of tax accounting as applied to the facts of this criminal case.

It is well settled that the time for accruing a tax liability is governed by the "all events" test, first articulated by this Court in *United States* v. *Anderson*, 269 U.S. 422, 441 (1926). Under that test, a liability accrues when "all the

---

[4]Indeed, as noted below (Pet. App. 8), petitioner's theory could make a Section 7201 prosecution impossible in such circumstances. The statute of limitations for prosecuting tax evasion is six years. I.R.C. § 6531(2). Yet the courts have generally held that a taxpayer has ten years from the date his return is filed to elect the foreign tax credit. *E.g.*, *Hart* v. *United States*, 585 F.2d 1025 (Ct. Cl. 1978). See I.R.C. § 6511(d)(3). Assuming that the foreign country's statute of limitations has not run, therefore, a dual-resident taxpayer on petitioner's theory could *always* assert the foreign tax credit as an automatic defense to a tax evasion charge.

[5]Petitioner (Pet. 23-25), joined by the Tax Section of the Florida Bar as *amicus curiae* (Amicus Br. 15), suggests that the *Campbell* court's reasoning "is no longer applicable." As the dissent below noted (Pet. App. 12-13), when *Campbell* was decided there existed "a substantial body of law holding that a foreign tax credit had to be claimed promptly or else it was lost," whereas the courts have recently interpreted Section 6511(d)(3) to give taxpayers a ten-year period within which to make the claim. See n. 4, *supra*. But while the *Campbell* court did observe that the defendant had "failed to enter a timely claim for the credit," it relied chiefly on the separate ground that he had "failed to make full and timely disclosure of his [foreign] income." 351 F.2d at 339. This latter basis for the court's decision is unaffected by recent developments concerning Section 6511(d)(3).

events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy." Treas. Reg. § 1.461-1(a)(2). The accrual of foreign taxes is governed by the same rule, so that, "for the purpose of the foreign tax credit, foreign income taxes are considered as accrued in the taxable year in which the taxpayer's liability for such foreign taxes becomes fixed and determinable." Rev. Rul. 61-93, 1961-1 C.B. 390, 392.

It is likewise settled that the "all events" test must be given a pragmatic construction. In *Flamingo Resort, Inc.* v. *United States*, 664 F.2d 1387, 1389 (9th Cir.), cert. denied *sub nom. Hilton Hotels Corp.* v. *United States*, No. 82-404 (Nov. 29, 1982), it was held that courts should "avoid[] a rigid definition of the term 'fixed' [liability] in order to be responsive to unique facts and practical considerations." In *Travis* v. *Commissioner*, 406 F.2d 987, 990 (6th Cir. 1969), the court applied the "all events" test by viewing the transaction as a whole " 'in the light of realism and practicality.' " And as early as *Barker* v. *Magruder*, 95 F.2d 122, 125 (D.C. Cir. 1938), it was held that a liability is to be accrued when, given "the course of dealings between the [parties]," there was "in the circumstances then confronting the taxpayer a reasonable anticipation [that the liability] would be paid."

At the times he filed his 1975-1978 returns, petitioner's tax liability to the Dominican Republic was not "fixed," and hence had not "accrued," under these well-established principles of tax accounting. At those times, petitioner had not reported any income to, or filed any tax returns with, the Dominican Republic. Such unreported income as has been discovered was evidenced by cash deposits and interest thereon in Spanish banks; Dominican tax authorities were unaware of this income and could not have been expected, in the normal course, to learn of it. There was no suggestion at the time of his offenses that petitioner intended ever to report his income to the Dominican Republic; indeed, he

was actively seeking to evade the taxes both of the United States and of that country.[6] Viewing petitioner's "course of dealings" with the Dominican Republic " 'in the light of realism and practicality,' " it is clear that his tax liability to it, far from being "fixed," was utterly speculative and theoretical.[7]

Contrary to the contentions of *amicus curiae*, therefore, the court of appeals did not sanction a " 'redefinition' of the term 'accrual' " (Amicus Br.3) when it approved the jury instruction at issue. The trial judge correctly determined that, where the circumstances reveal criminal tax evasion, more is required for accrual of a foreign tax under the "all events" test than that "the foreign income be earned in the taxable year in question" (Amicus Br. 9). The conditions set forth in the trial court's instruction — that the foreign

---

[6]It is well established that the "all events" test requires a taxpayer to postpone accrual of a foreign tax so long as he contests his liability therefor. *Dixie Pine Co.* v. *Commissioner*, 320 U.S. 516, 519 (1944); *Cuba R.R.* v. *United States*, 124 F.Supp. 182 (S.D. N.Y. 1954); Rev. Rul. 58-55, 1958-1 C.B. 266. Petitioner's tax liability to the Dominican Republic was even more speculative than if he had acknowledged, but formally contested, it. Whereas there is usually a reasonable possibility that a taxpayer will lose a contest, there was no likelihood at all that petitioner would ever pay the Dominican tax, except upon the fortuitous occurrence of his getting caught by the I.R.S.

[7]None of the cases cited by petitioner (Pet. 18-22, 27-28) or *amicus curiae* (Amicus Br. 13) stands for the proposition that a tax may be accrued in circumstances suggesting that it will never be paid. In *Elmhirst* v. *Duggan*, 14 F. Supp. 782 (S.D. N.Y. 1936); *Russell-Miller Milling Co.* v. *Helvering*, 69 F.2d 392 (D.C. Cir. 1934); *Hygienic Products Co.* v. *Commissioner*, 37 B.T.A. 202 (1938), aff'd, 111 F.2d 330 (6th Cir. 1940); and *Texas Co.* v. *Commissioner*, 9 T.C. 78 (1947), intent to evade taxes was not a factor, and the income in question was earned in (and hence was more easily discoverable by) the foreign taxing jurisdiction. Thus, the taxpayer's liability did not depend on the remote contingency, present here, that the foreign government would somehow discover income earned outside its borders by a person actively seeking to evade its tax.

government must be aware of the income and have computed a tax, and that the taxpayer must have acquiesced in or failed to contest its assertion — represent a reasonable interpretation of the "all events" test as applied to the facts of this criminal case. That instruction does not warrant review by this Court.[8]

3. Finally, contrary to the contentions of petitioner (Pet. 26-28) and *amicus curiae* (Amicus Br. 7-8, 16, 19-20), the decision below is consistent with the policy of "preventing double taxation." The court of appeals held only that petitioner's tax liability to the Dominican Republic had not "accrued," for the purpose of establishing a defense to charges of tax evasion for 1975-1978, at the times petitioner filed his returns for those years. But this is not to say that petitioner, for civil tax purposes, will be unable to claim a credit for Dominican taxes when and if they do "accrue." Indeed, the Service has ruled that a taxpayer forced to postpone accrual of a foreign tax because he contests liability is entitled to claim a credit once the contest is resolved, and that the credit will then "relate back" to the earlier year. Rev. Rul. 58-55, 1958-1 C.B. 267. The court of appeals recognized this principle (Pet. App. 7), and nothing in its

---

[8]The question presented here as to the construction of the "all events" test is analogous to that presented in *Flamingo Resort, Inc.*, on which this Court recently denied certiorari. The issue there was whether a casino was required to accrue gambling IOUs in income, even though the IOUs were legally unenforceable under state law. 664 F.2d at 1388. The Ninth Circuit held that the "speculative and potential legal objections" available to the casino's debtors were not dispositive for "all events" purposes, noting that the debtors almost invariably paid up and that, practically speaking, the liabilities represented by the IOUs were "as 'fixed' as it is possible to be." *Id.* at 1390. Here, conversely, while petitioner may have had a "speculative and potential" tax liability to the Dominican Republic at the time of his offenses, his liability, practically speaking, was nil, since there was no reasonable likelihood that he would discharge it.

opinion suggests that the principle would not apply here. The decision below thus poses no threat of double taxation. And the policy of preventing double taxation, as the court of appeals properly observed (Pet. App. 9 n.2), most surely does not require that the foreign tax credit function as "a 'loophole' that prevents * * * prosecution for evasion."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

OCTOBER 1983

DOJ-1983-10